

OPINION NUMBER 91-2

DATE: September 25, 1991

SUBJECT: Planning Department; Legal Actions Necessary to Place  
the Department under the City Manager

REQUESTED BY: Mayor Maureen O'Connor and Councilmember Ron Roberts

PREPARED BY: C. M. Fitzpatrick, Assistant City Attorney, and  
Frederick C. Conrad, Chief Deputy City Attorney

This opinion has been prepared in response to separate memoranda from each of you dated August 15, 1991, and September 5, 1991, in which you asked what legal actions would be required to place the Planning Department in the Administrative Service of the City, responsible to the City Manager and what appointment processes could be used in the appointment of the Planning Director.

OPINION

It is our view that:

(a) The City Council has the authority under current state law to place the Planning Department in the Administrative Service of the City by amending certain provisions of the San Diego Municipal Code ("Municipal Code");

(b) The current "City Manager acting as Planning Director" concept could be continued by amending the Municipal Code;

(c) Neither of the above methods would require an amendment to the City Charter ("Charter");

(d) Any proposal to place the Planning Department under the City Manager, but providing for appointment or confirmation of the Director by the City Council, would require an amendment to the Charter.

ANALYSIS

State Law

With respect to the planning function of local government, California Government Code section 65100 presently provides:

Section 65100. Planning agencies; assignment of functions

There is in each city and county a planning agency with the powers necessary to carry out the purposes of this title. The legislative body of each city and county shall by ordinance assign the functions of the planning agency to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof,

as it deems appropriate and necessary. In the absence of an assignment, the legislative body shall carry out all the functions of the planning agency.

Historically, until 1984 California Government Code section 65201 provided that the appointing power of each county and city could appoint a director of planning, who should be a person qualified by training, experience, and demonstrated ability to manage the affairs of the planning department. In 1984, however, the situation conceptually changed with the repeal of California Government Code sections 65201 and 65100 and the enactment of the new Section 65100 set forth above. Stat. 1984, c. 690.

The repeal of Section 65201 removed the provision that provided for the appointment of the Planning Director by the appointing power of the City. It should be noted that the new Section 65100 makes no reference to a Planning Director or the manner of appointing a person to that position, but instead authorizes the legislative body to adopt an ordinance assigning the planning function to a planning department, planning commission or to itself. Because the manner in which a Planning Director was to be appointed was repealed, it is our view that the legislature intended to leave to the legislative body the full discretion to determine the manner in which the planning function would be fulfilled and the Director (if any) appointed. This discretion may be exercised by the legislative body by adopting a legislative act which enunciates that policy decision.

#### Local Ordinance

In 1974, the City Council, as authorized by Charter section 11, adopted Ordinance No. 11499 (New Series) adding Municipal Code section 22.2401, Planning Department -- Powers and Duties of the Planning Director. This section, then and now, provides: "The Planning Department is a City department. The Director is the administrative head of the department and shall be appointed by the City Council. The Planning Director may be removed by the City Council." This ordinance was consistent with the provisions of California Government Code sections 65100 and 65201 in effect at that time and in our view is not inconsistent with the existing state law.<sup>F</sup>

At the time the position of Planning Director became vacant in 1987 by virtue of the retirement of Jack Van Cleave, we orally advised the Mayor and Councilmembers of this fact.

However, because the provisions of state law have changed, it is our view that the City Council may now, if it so chooses, by ordinance and subject to the constraints of the Charter, amend the provisions of Municipal Code section 22.2401 in such manner as it may determine relating to the appointment of the Planning Director. Such an ordinance amendment may place the Planning Department under the administration of the City Manager. If such an ordinance were duly adopted, the Charter,

in turn, provides that "the City Manager shall be responsible to the City Council for the proper administration of all affairs of the City placed in his charge, and . . . shall have the power to appoint and remove all officers and employees in the Administrative Service of the City under his control . . . ." Charter section 29 (emphasis added).

#### Applicability of the City Charter

Other than referenced and emphasized above, it does not appear to us that the current Charter is applicable to this question in any other way. Thus, a Charter amendment would not be needed to enable the City Council to place the Planning Director under the City Manager. From 1965 to 1984, the provisions of California Government Code section 65201 required that the appointing power of the City (the Mayor) appoint the Planning Director. During this period, a Charter amendment would arguably have been necessary in order to place the Planning Department under the Manager. From 1931 to 1965 the provisions of California Government Code section 65360 (repealed with the enactment of California Government Code section 65201) provided that the Planning Commission appoint the Planning Director. During this period, a Charter amendment would also have been necessary.<sup>F</sup>

In fact, in November 1964, two competing proposed Charter amendments were before the voters as Propositions D and T. Each of these measures provided for a reorganization of the planning function and each contained a provision placing the Planning Department under the Manager and authorizing him to appoint the Planning Director. Both ballot measures failed by substantial margins.

But a Charter amendment is no longer required because of the change in the applicable state statute referred to above.

The Charter itself contains no provision relating to the appointment of the Planning Director. The only reference to the planning function contained within the Charter is found at Section 41(c), City Planning Commission, which provides, *inter alia*, "the City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws." (Emphasis added.) The quoted language from Section 41(c) has remained the same since its adoption in 1931; however, it was a part of Section 42 until 1969.

However, it is also our view that if the Planning Director is appointed by the City Manager, subject to confirmation by the City Council, a Charter amendment would be necessary. Charter section 29 confers upon the City Manager the power to appoint and remove all officers and employees in the administrative service except as otherwise provided by the Charter. Charter sections 45, 57 and 58, relating to the appointment of the City Treasurer, Police and Fire Chiefs represent cases in which the appointing power of the City Manager has been modified to

provide for City Council confirmation of an appointment. Because the Charter presently contains no provision relating to the Planning Director, a Charter amendment adding a section providing for City Council confirmation of the appointment of the Planning Director by the City Manager would be necessary. We believe this constraint must, absent a specific Charter amendment, apply to the circumstances surrounding the Planning Director's status if the Director is placed under the City Manager's Charter authorized prerogatives.

We believe this follows from the clear application of a doctrine enunciated by our State Supreme Court in *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595 (1949), concerning the intrinsic nature of a city charter. In that case and a line of cases following (citations omitted), the court held that a charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess. Thus, it follows that if our legislative body wishes to place the planning responsibility in the hands of the City Manager for administrative and management purposes, they must do it in conformance with the Charter's constraints. The Charter's basic concept for departments under the Manager's control is that, with certain limited exceptions, i.e., Treasurer, Police and Fire Chiefs, the appointment process is solely within the Manager's prerogative. As an alternative to the provisions of Charter section 29 which provide that the City Manager shall have the power to appoint and remove all officers and employees in the administrative service under his control, an amended ordinance could provide that the City Manager shall serve as the Planning Director. While the City Manager, acting in the capacity of the Planning Director, would have the power to appoint employees of the Planning Department, he would remain directly accountable to the City Council for administration of the department under Charter section 29.

#### CONCLUSION

In summary, state law permits the City Council to organize the planning function in any manner it sees fit. The Planning Department, therefore, can be changed from an independent department to a "managerial department" (one which reports to the City Manager). If such a change were made, however, our City Charter requires that appointment (and removal) of the person in charge of the Planning Department be made by the City Manager. The City Council could retain its appointment and removal powers in one of two ways: (1) obtain a City Charter amendment granting those powers to the Council; or (2) direct the City Manager to assume the duties of the Planning Director.

Respectfully submitted,  
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